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No. 03-377

IN THE
# Supreme Court of the United States

KOONS BUICK PONTIAC GMC, INC.,
*Petitioner,*

v.

BRADLEY NIGH,
*Respondent.*

On a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

## BRIEF FOR RESPONDENT

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June 8, 2004

## QUESTION PRESENTED

The civil liability provision of the Truth in Lending Act provides, in relevant part, that any creditor who violates the Act "with respect to any person is liable to such person in an amount equal to the sum of—

> (1) [actual damages and]
> . . .(2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000, or (iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $200 or greater than $2,000[.]"

15 U.S.C. § 1640(a)(2)(A). The parties agree that the limitation on "liability under this subparagraph" does not apply to (A)(iii). The question presented is

Whether the term "this subparagraph," and thus the limitation on damages awards set forth in (A)(ii), applies just to (A)(ii) or to both (A)(i) and (ii).

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## INTRODUCTION

This case presents a straightforward question of statutory interpretation. At issue is the meaning of a short phrase—"this subparagraph"—in the Truth In Lending Act ("TILA") that, in the context of the subdivision in which it appears, can refer to only one provision, section 1640(a)(2)(A)(ii). The legislative history is silent on the question. Construing the phrase according to its plain meaning does not lead to absurd results and is consistent with the statute's remedial purpose. Accordingly, the Fourth Circuit's holding that "this subparagraph" refers only to (ii) should be affirmed.

## STATEMENT OF THE CASE

### THE TRUTH IN LENDING ACT

Congress enacted TILA "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing practices," 15 U.S.C. § 1601(a), and "to assure a meaningful disclosure of the terms of leases." *Id.* § 1601(b); *see Mourning v. Family Publ'ns Serv., Inc.*, 411 U.S. 356, 377 (1972) (TILA "reflects a transition in Congressional policy from a philosophy of 'Let the buyer beware' to 'Let the seller disclose.'"). Because the statute is remedial in nature, its terms must be liberally construed to achieve Congress's purpose. *Burnett v. Ala Moana Pawn Shop*, 3 F.3d 1261, 1262 (9th Cir. 1993); *McGowan v. King*, 569 F.2d 845, 848 (5th Cir. 1978); *N.C. Freed Co. v. Board of Governors*, 473 F.2d 1210, 1214 (2d Cir. 1973); *Pechinski v. Astoria Fed. Sav. & Loan Ass'n*, 238 F. Supp. 2d 640, 642 (S.D.N.Y. 2003) ("The Courts of Appeals have consistently ruled that TILA should be liberally construed

in favor of the consumer in order to effectuate Congress' intent. . .").

Violations of the disclosure requirements may subject a creditor to civil and criminal liability. With respect to civil liability, Congress allowed consumers to recover both actual and statutory damages. 15 U.S.C. § 1640; *see infra* pp. 5-6 (text of current and former versions of statutory damages provision).

In the 1980 Truth in Lending Simplification and Reform Act, Congress overhauled TILA to "make creditor compliance easier" and "limit civil liability for statutory penalties to only significant violations," among other reasons. S. Rep. No. 96-368, at 16 (1979), 1980 U.S.C.C.A.N. 236, 251; *id.* at 267 (law restricts scope of civil liability "to only those disclosures which are of material importance in credit shopping"). The 1980 limits on the types of violations that give rise to liability for statutory damages remain in effect today.

## FACTUAL BACKGROUND

In February 2000, respondent Bradley Nigh contracted to purchase a 1997 Chevrolet Blazer from petitioner Koons Buick ("Koons"). As part of the transaction, Mr. Nigh traded in his truck and made a $4,000 down payment. He got no credit against the purchase price for his trade-in because he estimated the remaining loan balance on his truck to equal the price that Koons gave him for it. Mr. Nigh signed a Buyer's Order, reflecting the purchase, and a retail installment sales contract, reflecting the financing. Mr. Nigh left his truck and drove home in the Blazer. Pet. App. 2a.



Koons later told Mr. Nigh that it was unable to find an assignee to purchase the assignment of the installment payments for the Blazer. Koons then restructured the deal to require an additional $2,000 down payment. Koons represented to Mr. Nigh that this change was a "better deal" at a lower interest rate and that he had to sign a new contract. Mr. Nigh returned to the dealership and told Koons that he did not have an additional $2,000. He asked Koons to allow him to return the Blazer, take back his truck, and walk away from the deal. Koons told him—falsely—that he could not withdraw from the deal because it had already sold his truck. Mr. Nigh, "unaware of this statement's falsity, and at a loss," signed a second contract and a $2,000 promissory note. *Id.* 3a.[1]

In the third line of the first contract, Koons had typed in only "N/A." In that line of the second contract, Koons typed in "SILENCER" and listed the price "965.00." 4th Cir. Jt. App. 45, 62.

About one week later, Koons again contacted Mr. Nigh to say that it was unable to sell the loan contract. Mr. Nigh alleged that Koons left a message that if he did not come to sign yet another contract, it would report the Blazer as stolen. Afraid of being arrested, Mr. Nigh returned to Koons and signed a third contract under protest. Pet. App. 3a.

Mr. Nigh stopped making payments on the note for his trade-in vehicle when he believed that it had become the property of Koons. He eventually learned that his truck had not been sold as Koons had told him, and had later been

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[1]For a discussion of such "yo-yo" sales practices, see *Rucker v. Sheehy Alexandria*, 228 F. Supp. 711, 718 (E.D. Va. 2002), and *Singleton v. Stokes Motors, Inc.*, 595 S.E.2d 461 (S.C. 2004).

repossessed by its note-holder from the Koons lot because of Koons's non-payment on the note. He also learned that one reason Koons could not find an assignee to assume the second contract was that it wrongfully included the $965 charge for the Silencer accessory that Mr. Nigh had neither requested, agreed to accept, nor received. *Id.* 3a-4a.

Even after the third contract was signed and the loan sold, Koons did not transfer title of the Blazer to Mr. Nigh. Approximately six weeks after signing the third contract, Mr. Nigh returned the Blazer to Koons with a letter asking for return of his down payment and trade-in. *Id.* 4a; 4th Cir. Jt. App. 772. Koons refused to return any money to Mr. Nigh and yet continued to withhold title to the Blazer.

**PROCEEDINGS BELOW**

Mr. Nigh sued Koons alleging claims under TILA, the Federal Odometer Act, the Virginia Consumer Protection Act ("VCPA"), and common law fraud. Koons filed a counterclaim for breach of contract and for fraudulent and negligent misrepresentation. The district court granted summary judgment to Koons on some claims, and other claims were tried to a jury. The jury found that Koons violated TILA "by intentionally including a charge" (the charge for the Silencer) on the sales contract "with knowledge that there was no basis for the charge," Pet. App. 9a, and that Koons violated the VCPA by falsely telling Mr. Nigh that it no longer had possession of his trade-in, so as to induce him to sign a new sales contract. *Id.* 4a. The jury awarded Mr. Nigh $24,192.80 (twice the amount of the finance charge in connection with the transaction) for the TILA violation and $4,000 for the VCPA violation. *Id.* 2a.



The parties appealed various aspects of the district court judgment to the Fourth Circuit. For present purposes, the only relevant issue is Koons's argument that TILA section 1640(a)(2)(A) capped the damages award at $1,000. Koons based its argument on *Mars v. Spartanburg Chrysler Plymouth*, 713 F.2d 65 (4th Cir. 1983). There, the court of appeals was applying a prior version of TILA, which provided that damages would be equal to

> (2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, or (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability **under this subparagraph** shall not be less than $100 nor greater than $1,000[.]

15 U.S.C. § 1640(a) (1983) (emphasis added). In *Mars*, the court of appeals had held that the bold-faced language applied to both (i) and (ii), and therefore that damages awarded under either (i) or (ii) were limited to $1,000. 713 F.2d at 67.

Looking to the current version of section 1640(a)(2)(A), the Fourth Circuit rejected Koons's reliance on *Mars*. Since its amendment in September 1995, section 1640(a)(2)(A) provides that creditors who violate TILA may be liable for

> (2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per

> centum of the total amount of monthly payments under the lease, except that the liability **under this subparagraph** shall not be less than $100 nor greater than $1,000, or (iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $200 or greater than $2,000 [.]

15 U.S.C. § 1640(a) (1995) (emphasis added). In an opinion by Judge Luttig, the court held that, although its prior assumption about the scope of "this subparagraph" was "plausible" in 1983, the 1995 amendment "rendered [that] interpretation defunct." Pet. App. 11a. The court held that, under the plain language of section 1640(a)(2)(A), "this subparagraph" refers only to (ii)—the subpart in which the words appear. Accordingly, the court of appeals upheld the jury's award of twice the finance charge. *Id.* 11a-13a.

Writing separately, Judge Gregory agreed that Koons "engaged in a variety of scurrilous business practices that support the jury's finding of liability under TILA." *Id.* 22a. He dissented, however, on the ground that the legislative history of the 1995 amendment did not manifest a specific intent to lift the statutory cap, and thus to abrogate *Mars*. *Id.* 17a.

## SUMMARY OF ARGUMENT

The question in this case is to what does the term "this subparagraph" refer in TILA section 1640(a)(2)(A). Section 1640(a)(2)(A) has three subdivisions, enumerated (i), (ii), and (iii). Without doubt, (A)(iii) is not subject to the $1,000 cap on "liability under this subparagraph." Therefore, "this subpara-



graph" cannot sensibly refer to all of (A). Furthermore, (A)(i) and (A)(ii) taken together do not form a "subparagraph." Therefore, "this subparagraph" cannot refer to both (A)(i) and (A)(ii). "This subparagraph," and thus the $100 to $1,000 damages limitation, can refer only to the subpart in which it physically appears: (ii).

Despite the statutory text, Koons argues that the legislative history of the 1995 TILA amendments requires a different result. According to Koons, because Congress in 1995 did not state that it was lifting the limits on damages under (A)(i), it could not have intended to do so. The absence of legislative history, however, cannot override the statutory text. That text is susceptible of only one interpretation, as the Fourth Circuit held. And because that interpretation is not absurd, this Court must give it effect.

## ARGUMENT

### A. The Plain Text Of The Statute Requires Affirmance Of The Decision Below.

1. As Judge Luttig held, the plain language of section 1640(a)(2)(A) supports only one reading: The limits stated in subpart (ii) apply only to awards under subpart (ii). Again, the relevant provision states:

> **(2)(A)(i)** in the case of an individual action twice the amount of any finance charge in connection with the transaction, **(ii)** in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, **except that the**

> **liability under this subparagraph shall not be less than $100 nor greater than $1,000,** or **(iii)** in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $200 or greater than $2,000[] (emphasis added).

The question here is whether "under this subparagraph" refers to (i) and (ii), or only to (ii). Because (iii) states its own maximum and minimum, "this subparagraph" cannot include (iii). *See* Pet. 22 n.14 (stating that "obviously" the phrase "cannot apply to subpart (iii)"). Accordingly, the "subparagraph" referred to in section 1604(a)(2)(A)(ii) cannot be (A) as a whole. Moreover, (i) and (ii) together do not constitute a discrete subparagraph. Accordingly, when (ii) says "this subparagraph," it can only be referring to itself. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'") (citations omitted).

2. Recognizing that the existence of (iii) is a significant obstacle to its preferred statutory reading, Koons argues (at 29) that "this subparagraph" reasonably denotes all of (A), even though it does not include (A)(iii), because (A)(iii) is merely a "carve-out" of (A)(i). This theory is premised in part on the notion that subpart (iii) "does not include any measure of damages." Pet. Br. 29. But it does: "not less than $200 or greater than $2,000," as several courts have found. *See In re Mourer*, 287 B.R. 889, 897 (Bankr. W.D. Mich. 2003); *Williams v. BankOne*, 291 B.R. 636, 663 (Bankr. E.D. Pa. 2003); *Rodrigues v. United States Bank*, 278 B.R. 683, 689-90 (Bankr. D.R.I. 2002); *In re United Cos. Fin. Corp.*, 267 B.R. 524, 529 (Bankr. D. Del. 2000). Congress often defines the measure of damages in similar terms. *See, e.g.*, 15 U.S.C. § 1681n(1)(A) (violator of Fair Credit Reporting Act liable to consumer for actual damages *or* between $100 and $1,000); 15 U.S.C. § 1692k(a)(2)(A) (statutory damages not to exceed $1,000 under Fair Debt Collection Practices Act); 17 U.S.C. § 504(c) (statutory damages of between $500 and $20,000 for copyright infringement); 29 U.S.C. § 2104(a)(3) (civil penalty of up to $500 per day for violations of WARN Act). In fact, Congress similarly defined the measure of damages in TILA section 1640(a)(2)(B), which provides that, in a class action, damages will be in "such amount as the court may allow," but "shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the creditor."



Subpart (iii) is a "carve-out" of (i) in the sense that it applies to a subset of the transactions that previously fell under (i). Nonetheless, the statutory language nowhere indicates that Congress was excepting subpart (iii) from any generally applicable provisions of (A). Instead, the language defines three categories of "individual actions," each of which is separately enumerated at the same level of the outline form and has its own method of calculating damages. If Congress's intent were as Koons describes it—to take transactions subject to (iii) out of the scope of provisions otherwise applicable to them—then the whole of (2)(A) would look very different from what the statute actually says. The statute described by Koons would look something like

> (2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, or (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter,

> 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000; Provided, however, that in the case of an individual action under subpart (i) relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $200 or greater than $2,000;

To be sure, Congress could have enacted such a statute. But it did not.

3. Koons argues (at 30) that the phrase "under this subparagraph" is superfluous under the Fourth Circuit's reading, and thus that "this subparagraph" must refer to two out of the three parts of (A). *But see Lamie v. United States Trustee*, 124 S. Ct. 1023, 1031 (2004) ("our preference for avoiding surplusage is not absolute."). However, as Judge Luttig pointed out, Pet. App. 12a-13a, without the phrase "under this subparagraph," the limitations might arguably be read to apply to both (i) and (ii). With the phrase, the statute makes clear that the limits apply only to "this" subparagraph. Again, the only discrete subpart to which "this" could possibly refer is (A)(ii).

Similarly, Koons argues (at 30) that the absence of the words "this subparagraph" in (iii) somehow demonstrates that inclusion of those words in (ii) makes them applicable to (i) as well. As just discussed, the term in (ii) makes clear that the limitation applies only to (ii), and not also to (i). Given the structure of (A), no clarification is necessary with respect to the limitation in (iii).



The word "subparagraph" also appears in section 1640(a)(2)(B). Because in subpart (B) "the term 'subparagraph' indisputably refers to all of (B)," Pet. Br. 23, Koons argues that in section 1640(a)(2)(A)(ii) the word must refer to all of (A). This theory misses the mark. First, as discussed above, Koons concedes (*e.g.*, at 20, 21) that the limitation on damages under "this subparagraph" does not apply to all of (A). Its contention is that it applies to two-thirds of (A)—a reading inconsistent with its own argument about (B).

Second, unlike (A), (B) has no subparts. Thus, each use of the word "subparagraph" refers to the "sub" in which the word appears: to (A)(ii) and to (B). Use of the term "subparagraph" in a single statutory section to refer to two different levels of the section's subdivisions is by no means unique to TILA. *See, e.g.*, 12 U.S.C. § 1823(c)(2)(A) (referring to both "subparagraph (B)" and "subparagraphs (i) through (iii)"); 42 U.S.C. § 7661a(b)(3)(B)(i) (referring to "subparagraphs (ii) through (v) of this subparagraph").

4. Koons spends several pages explaining that a statutory subparagraph is represented by an uppercase letter, not a lower case roman numeral. As described by Koons, statutes typically follow the following outline structure:

§ section
(a) subsection
(1) paragraph
(A) subparagraph
(i) clause
(I) subclause

Koons's heavy reliance on Congress's alleged rigid adherence to this structure is misplaced for several reasons.

First, even assuming that Koons is correct, the nomenclature described by Koons is fully consistent with the Fourth Circuit's and Mr. Nigh's reading. When Congress follows this format, and wants to refer to (i), for example, it may refer either to "subparagraph (A)(i)" or to "clause (i)." *See* House Legislative Counsel's Manual on Drafting Style, Nov. 1995, at 52 ("House Manual") (lodged with the Court by Petitioner).

In the provision at issue, Congress stated "this subparagraph" without further specification. As implicitly acknowledged by Koons (at 22 n.9), "this subparagraph" standing alone may refer either to "subparagraph (A)(ii)" or to "subparagraph (A)." However, in the context of (A) as a whole, only the former reading is possible. Again, "this subparagraph" cannot refer to all of (A) because, without dispute, (A)(iii) is not subject to the $1,000 cap on "liability under this subparagraph." Yet nothing in the sources cited by Koons suggests that "this subparagraph" can ever mean "clauses (i) and (ii) but not (iii) of subparagraph (A)." Accordingly, "this subparagraph" must refer to (A)(ii).

Second, the legislative drafting manuals on which Koons primarily relies are not authoritative statements of congressional practice. To the contrary, the House manual states that it is "not intended to be a treatise on legislative drafting, but rather a guidebook for individuals who are undergoing, or have undergone, on-the-job drafting training." House Manual at III. Moreover, the manual recognizes that a "variety of drafting styles exist today," and that the style described in the manual is "not the style most prevalently used in the past." *Id.* at 11. It further observes that "the diversity of



individuals drafting makes a consensus on a precise guide respecting structure and style an impossibility." *Id.* at 21.[2]

Consistent with the House manual's observation, the United States Code offers many examples of provisions in which Congress referred to a statutory subpart at the level of "(i)" as a "subparagraph." *E.g.*, 12 U.S.C. § 1823(c)(2)(A)(iv) ("subparagraphs (i) through (iii)"); 42 U.S.C. § 300ff-13(a)(3)(C) ("subparagraph (ii)"); 42 U.S.C. § 5105(A)(2) ("subparagraphs (i) through (ix)"); 42 U.S.C. § 7661a(b)(3)(B)(i) ("subparagraphs (ii) through (v) of this subparagraph"); 50 App. U.S.C. § 456(c)(2)(A) ("subparagraphs (ii) and (iii) of this clause"); 50 App. U.S.C. § 2016(a)(1)(A)(ii) ("subparagraph (i)").

Similarly, Congress does not consistently follow the manuals' guidelines with respect to the nomenclature of other statutory subparts. *E.g.*, 33 U.S.C. § 2024 (referring in (e) to "paragraph (g)" and in (f) to "paragraph (iii)"); 33 U.S.C. § 2025(b) (referring to "(a)" as paragraph, rather than subsection); 42 U.S.C. §§ 417(e)(1), (2) (twice referring to "(1)(B)" as "clause (B)"); 50 App. U.S.C. § 456(c)(2)(A) (referring to "A" as "clause"); *see also* S. Ct. R. 14(1)(i)(iv) (referring to Rule 14(1)(i)(i) as "sub-subparagraph (i)"). Nor does Congress consistently follow the order of characters—

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[2]Indeed, the House and Senate manuals conflict on several points. For example, the House manual suggests structuring bills in the following order: general rule, exceptions, special rules, transitional rules, other provisions, definitions, effective date. House Manual at 23. The Senate manual, however, offers the following order: definitions, general rule, exceptions, special rules, transition rules, effective date. Senate Legislative Drafting Manual, Feb. 1997, at 9 ("Sen. Manual") (lodged with the Court by Petitioner).

(a)(1)(A)(i)—described in the manuals. *See, e.g.*, 16 U.S.C. § 1280(a)(i); 22 U.S.C. § 2452(a)(1)(i)(A); 33 U.S.C. § 2024(a)(i); 33 U.S.C. § 2030(a)(i) (referred to in (a)(ii) as "subparagraph (i)"); 43 U.S.C. § 1595(a)(4)(i); 45 U.S.C. § 231c(f)(2)(i); 48 U.S.C. § 1574(b)(ii)(A).

Not surprisingly, the manuals are not cited in any reported case from this Court or any federal appellate court or district court.[3]

Third, the manuals are dated after the passage of the September 1995 TILA amendment at issue in this case. *See* House Manual at I (Nov. 1995); Sen. Manual at 1 (Feb. 1997). Accordingly, Congress did not have access to and could not have relied on these manuals when it drafted the TILA amendments. *Cf. Wright v. West*, 505 U.S. 277, 295 n.9 (1992) ("we have often observed that 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'") (citation omitted); *Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990) (Scalia, J., concurring in part) ("Arguments based on subsequent legislative history, like arguments based on antecedent futurity, should not be taken seriously, not even in a footnote").[4]

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[3]The House manual has been cited three times in footnotes by Judge Chabot of the United States Tax Court. *Robinson v. C.I.R.*, 119 T.C. No. 4, 119 T.C. 44, 61 n.10 (2002); *Electronic Arts, Inc. v. C.I.R.*, 118 T.C. No. 13, 118 T.C. 226, 242 n.9 (2002); *Rochelle v. C.I.R.*, 116 T.C. No. 26, 116 T.C. 356, 367 n.2 (2001) (dissent).

[4]Amici American Bankers Association, *et al.* (at 14) make a similar argument based on a website, xml.house.gov, that did not exist in 1995. The website sets forth information about a programing language called eXtensible Markup Language, which the House did (continued...)



Finally, even if Koons were correct that "subparagraph" *must* mean (A), and not (A)(ii), the Court still should not adopt Koons's reading of the statute. Rather, if Koons is correct about the term's meaning, then Congress simply made a mistake. It neglected in 1995 to change "subparagraph" to "clause." To assume that Congress erred by using the word "subparagraph" would do far less damage to the language and structure of section 1640(a)(2)(A) than would Koons's reading. *See supra* pp. 9-10.

### B. The Legislative Purpose And History Are Consistent With The Decision Below.

As this Court has stated, "[t]he starting point in discerning congressional intent is the existing statutory text . . . and not the predecessor statutes." *Lamie*, 124 S. Ct. at 1030 (citation omitted). And "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Id.* (citing cases). Nonetheless, unhappy with the statutory language, Koons argues that the legislative history, or rather the lack thereof, reveals Congress's true intent.

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[4](...continued)
not use for drafting until September 2002. *See* http://xml.house.gov/drafting.htm. Even now, the website cautions that the definitions are in "draft form" and that the House does not guarantee their quality or reliability. *See* http://xml.house.gov. In any event, amici overstate the import of the website's definitions when they write that, under the definition they quote, "this subparagraph" "could refer *only* to subparagraph (A)." Am. Bankers Br. 14 (emphasis added). In fact, the quoted definition states only that subparagraphs "are *normally* enumerated with an uppercase character within parentheses." *Id.* (emphasis added).

Koons argues that in 1995 Congress intended only to add a new cap on damages related to closed-end credit plans secured by real property, and not to lift the ceiling on damages related to other transactions. This argument is based, however, not on a statement in the legislative history, but on the absence of one. The legislative history does not say either way what Congress intended with respect to damages under (i). "Of course, where the language is unambiguous, silence in the legislative history cannot be controlling." *Dewsnup v. Timm*, 502 U.S. 410, 419-20 (1992). Moreover, because the point at issue is "merely a difference between the more parsimonious policy of an earlier enactment and the more generous policy of a later one, there is no more basis for saying that the [later] Congress forgot than for saying that the [later] Congress felt differently." *West Va. Univ. Hosps. v. Casey*, 499 U.S. 83, 101 (1991); *see also Brown v. Payday Check Advance, Inc.*, 202 F.3d 987, 991 (7th Cir. 2000) ("Section 1640(a) says that statutory damages are available 'only' for violations of enumerated subsections and rules. Section 1632(a) is not on that list. *Whether Congress should have included it, or would have done so had it thought more fully, does not affect interpretation of the law it actually enacted.*") (emphasis added). As the Fourth Circuit stated, "the critical point of law—and it is critical—is that we do not know what Congress intended; all that we have before us is the amended statute from which to determine intent. . . . It is the law, and not any inferential intent, that constitutes the law." Pet. App. 13a.

Koons's argument on this point resembles the argument rejected by the Court in *Lamie*. There, the petitioner urged the Court to override the plain text of a provision of the bankruptcy statute because, he argued, Congress had made a drafting error and meant something different from what the statute said. Declining the petitioner's invitation to rewrite the law, this



Court noted its longstanding "deference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of the bill." *Lamie*, 124 S. Ct. at 1032 (quoting *United States v. Locke*, 471 U.S. 84, 95 (1985)).

As in *Lamie*, the Court here is bound by the words of the law that Congress enacted. "If Congress enacted into law something different from what it intended, then it should amend the statute to conform to its intent. 'It is beyond our province to rescue Congress from its drafting errors, and to provide for what we think . . . is the preferred result.'" *Id.* at 1034 (quoting *United States v. Granderson*, 511 U.S. 39, 68 (1994)) (ellipsis in original). Here, in light of the undisputed fact that the limitation on "liability under this subparagraph" does not refer to all of subpart (A), section 1640(a)(2)(A) affords only one reasonable reading: "This subparagraph" refers only to (A)(ii).

### C. The Fourth Circuit's Reading Of The Plain Language Does Not Produce "Odd" Or Unconstitutional Results.

1. Under section 1640(a)(2)(A), Congress provided for damages for TILA violations of three sorts: Subpart (i) addresses "the case of an individual action;" subpart (ii) addresses "the case of an individual action relating to a consumer lease," and subpart (iii) addresses "the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling" (not including a residential mortgage). The parties agree that damages under (ii) are subject to a $100 floor and a $1,000 ceiling, and that damages under (iii) are subject to a $200 floor and a $2,000 ceiling.

Koons argues that, having limited damages under (ii) and (iii), Congress could not have intended that damages under

(i) have no limits. However, through other provisions, TILA does limit damages under (i). Pursuant to section 1603, TILA does not apply to loans in excess of $25,000, unless the loan is secured by real property or a dwelling. *See also* 12 C.F.R. § 226.3(b). Given this provision (and the fact that loans secured by real property fall under (iii)), damages under (A)(i) will not exceed about $30,000. In fact, damages will usually be much less, particularly in cases involving credit card transactions, where finance charges are relatively small. *See, e.g., Strange v. Monogram Credit Card Bank*, 129 F.3d 943 (7th Cir. 1997) ($27.36 finance charge); *Belmont v. Associates Nat'l Bank*, 119 F. Supp. 2d 149, 166 (E.D.N.Y. 2000) ($769.13 finance charge).[5]

For example, Mr. Nigh financed more than $19,000, and the finance charge was about $12,100. 4th Cir. Jt. App. 55. Because the amount financed was fairly close to the TILA maximum, and Mr. Nigh financed at a high interest rate (APR of 20.95%), *id.* this case shows that damages awards under (A)(i) will usually be less than the amount awarded in this case and will never be significantly more. Indeed, amicus Virginia

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[5]If a car buyer finances the maximum amount of $25,000 at the very high APR of 20.95 percent (the rate of Mr. Nigh's loan), over 60 months, the total finance charge will be $15,537.86. At the current average rate of 5.72% for a 60-month new car loan, the finance charge will be only $3,804.31. *See* www.bankrate.com/brm/rate/auto_home.asp?link=5, viewed June 1, 2004 (current rate); www.bankrate.com/brm/subhome/auto_A6.asp, viewed June 1, 2004 (for 60-month new car loan, average rate over past three months has ranged from approximately 5% to approximately 7.46%); *see also* www.bankrate.com/brm/static/rate-roundup.asp, viewed May 18, 2004 (for 36-month used car loan, "average used-car loan rate has increased in four of the past six weeks [as of May 13], and at 8.34 percent is the highest since August 27, 2003").



Automobile Dealers Association (at 6) posits that the average damages award associated with an auto loan will be about $9,000. Given inflation, a consumer would have to get $5,402.30 today to recover the value of the $1,000 award that Congress thought warranted in 1968. *See* http://stats.bls.gov/cpi/, visited June 1, 2004 (Dep't of Labor inflation calculator). The "extra" $3,618 the consumer may receive in the "average" TILA auto loan suit under the 1995 statute hardly demonstrates an irrational statutory scheme.

TILA's civil liability provisions are intended to provide an incentive to creditors to comply with the law and to consumers to enforce their rights. In 1995, 27 years after it enacted TILA, Congress may have felt that it was time to lift the $1,000 cap on damages related to loans such as auto loans because $1,000 in 1968 dollars was worth only $228.35 in 1995 dollars. *See* http://stats.bls.gov/cpi/.

On the other hand, in actions under (A)(iii) for improper disclosure of finance charges in connection with a mortgage or home equity loan, consumers may seek rescission, in addition to damages under section 1640(a)(2)(A)(iii). The right to rescission extends for three years and entitles the consumer to full reimbursement of all finance charges, interest, and other charges, including closing costs. 15 U.S.C. §§ 1635(b), 1635(f). This remedy, potentially worth tens of thousands of dollars, has no counterpart for individual actions brought in connection with auto loans or credit card transactions under (A)(i). *See In re Mourer*, 287 B.R. at 895 ("The repercussions of rescission in bankruptcy cannot be underestimated. A valid rescission would void the security interest and eliminate the Mourer[s'] obligation to pay finance or other charges."). It is hardly anomalous, therefore, that Congress would cap the additional recovery available under section 1640(a)(2)(A)(iii),

but would not cap the sole TILA recovery available in cases subject to section 1640(a)(2)(A)(i).

Furthermore. with respect to mortgages and other loans secured by real property, which are addressed in (A)(iii) and to which the $25,000 loan limit of section 1603 does not apply, uncapped damages of double the finance charge could result in awards of hundreds of thousands of dollars. If calculated based on the finance charge and then capped at $2,000, awards related to mortgages would almost always equal $2,000. Therefore, Congress made the reasonable decision to provide a range of damages for such transactions, rather than to provide for the calculation of damages by doubling an amount that would already exceed the upper limit of the range.

Koons (at 36) also suggests that if consumers are not guaranteed $100 for their trouble, they might be discouraged from bringing TILA suits. But surely the hope of $100 does not motivate any consumer (or consumer lawyer) to sue. And perhaps the fact that the $100 Congress wrote into the law in 1968 was worth only $22.83 in 1995 led Congress to recognize that the floor had so little value that it should be eliminated. In 1980, Congress made clear that it was maintaining the $100 floor to benefit consumers because, "without a fixed penalty, there will be many instances where actual damages alone will provide little or no effective remedy for the consumer who relied on inaccurate disclosures to his detriment." 1980 U.S.C.C.A.N. 267. By 1995, this reasoning no longer applied because the value of $100 had declined so considerably.

The legislative history does not reveal why Congress removed the limits for credit transactions under (i) but not for consumer leasing transactions under (ii). Nonetheless, the decision to treat consumer remedies for the two types of



transactions differently is not surprising, as Congress has treated the two types of transactions differently in several respects. Consumer leases are addressed predominantly through the Consumer Leasing Act, 15 U.S.C. § 1667, which was enacted in 1976 as an amendment to TILA and incorporates TILA's remedy provision. *Id.* § 1667d. Under TILA, creditors may be held liable only for certain "significant" disclosure violations. 1980 U.S.C.C.A.N. 251; *see* 15 U.S.C. § 1640(a) (*see* text following (4)); *Baker v. Sunny Chevrolet, Inc.*, 349 F.3d 862, 866 (6th Cir. 2003); *Brown v. Payday Check Advance,* 202 F.3d at 991. On the other hand, under the Consumer Leasing Act, lessors may be held liable for *any* violation. 15 U.S.C. § 1667d. Accordingly, a cap on damages is more appropriate with respect to (A)(ii), under which lessors may be held liable for insignificant Consumer Leasing Act violations, than with respect to (A)(i), under which creditors may be held liable only for significant TILA violations.

In addition, individual actions under (i) are subject to a one-year statute of limitations, 15 U.S.C. § 1640(e), while individual actions under (ii) may be brought anytime up to one year after the termination of the lease. *Id.* § 1667d(c). This distinction does not explain Congress's decision to apply different damages caps, but it does illustrate that Congress does not think that consumer remedies for each of the two categories of transactions require the same legislative treatment.

2. Koons also suggests that reading the statute according to its plain language would largely eliminate the utility of class action litigation under TILA because section 1640(a)(2)(B) caps statutory damages in class actions at $500,000 or 1 percent of the net worth of the creditor, whichever is less. *But see Union Bank v. Wolas*, 502 U.S. 151, 158 (1991) ("fact that Congress may not have foreseen all of

the consequences of a statutory enactment is not sufficient reason for refusing to give effect to its plain meaning"). Koons's argument is based on the idea that class actions are not viable if class members would get more in individual actions than they would get by participating in a class recovery. Yet the principal effect of section 1640(a)(2)(B) is to do just that, whenever the class is large. In practice, TILA class actions often result not just in a smaller recovery per class member than would be available in an individual action (under (i), (ii), or (iii)), but in a recovery that is small, in absolute terms, for each class member. *See, e.g., Postow v. OBA Federal Sav. & Loan Ass'n*, 627 F.2d 1370 (D.C. Cir. 1980) ($100 per class member); *Fetta v. Sears, Roebuck & Co.*, 77 F.R.D. 441 (D.R.I. 1977) ($5.38 per class member); *Eovaldi v. First Nat'l Bank of Chicago*, 71 F.R.D. 334 (N.D. Ill.1976) (95,000 members sharing in statutory damages of $100,000); *accord Johnson v. West Suburban Bank*, 225 F.3d 366, 374 (3d Cir. 2000) ("Indeed, individual plaintiff recoveries in a [TILA] class action may be lower than those possible in individual suits because the recovery available under TILA's statutory cap on class recoveries is spread over the entire class."). On the other hand, where the number of class members is relatively small (fewer than 500), each member has always had, and still has, the possibility of recovering more than $1,000.

Thus, TILA class actions continue to be as viable as ever in situations where the recovery in an individual action would be small. Indeed, the Advisory Committee Notes to Federal Rule of Civil Procedure 23(b)(3) expressly identify cases in which "the amounts at stake for individuals may be so small that separate suits would be impracticable" as particularly well-suited to class treatment. *See* 39 F.R.D. 69, 104 (1966). Congress's 1995 amendment to TILA does not affect the efficiency or desirability of class treatment in such cases. And



even Koons would concede the utility of class actions in consumer lease, real estate, and home equity cases, which are subject to the damages limits of (ii) and (iii), and are not affected by the Fourth Circuit's plain language reading of (i). Finally, in many TILA cases, such as this one, class treatment would not be appropriate because of the fact-specific nature of the claim.

3. Petitioner's brief (at 32) and the amicus brief of the Michigan Bankers Association ("MBA") (at 8-9) suggest that the Fourth Circuit's decision raises due process concerns under this Court's analysis in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003). This argument was not raised below and is, therefore, waived. *United States v. Bean*, 537 U.S. 71, 75 n.2 (2002); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002).

In any event, as Koons and its amici must acknowledge, the punitive damages guidelines discussed in *State Farm* are "not strictly applicable" here. MBA Br. 9. In many instances in which Congress has provided for statutory damages or penalties, the plaintiff's recovery will be many times the amount of actual damages. In such cases, application of a *State Farm* analysis makes little sense. For example, in any TILA case in which the $100 to $1,000 damages limit applies and actual damages are nominal, a statutory damages award of even $100 would be many times more than the ratio of compensatory to punitive damages that the Court disapproved in *State Farm*. Yet Congress clearly thought that actual damages alone would not adequately protect consumers from abusive, misleading, and fraudulent lending practices, and that a statutory award was warranted. Thus, Congress provided for awards of *both* actual damages (§ 1640(a)(1)) *and* statutory damages (§ 1640(a)(2)).

As this Court has stated, "legislative judgments concerning appropriate sanctions for the conduct at issue" are entitled to "substantial deference." *BMW of N. Am. v. Gore*, 517 U.S. 569, 583 (1996) (quoting *Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc.*, 492 U.S. 257, 301 (1989) (O'Connor, J., concurring in part and dissenting in part)). Accordingly, legislative judgments about appropriate statutory penalties guide this Court's review of punitive damages awards, not the other way around. *See, e.g., State Farm*, 538 U.S. at 425; *BMW v. Gore*, 517 U.S. at 583 & n.38, 584.

Moreover, the MBA's argument (at 9) rests on the premise that TILA violations are mostly inadvertent technical errors by well-meaning lenders. Yet in many cases, as in this one, the opposite will be true. *See, e.g., Singleton*, 595 S.E.2d 461 (discussing unlawful "yo-yo" sales). Equally important, Koons and its amicus neglect to mention that creditors are not liable for TILA violations that are "not intentional and resulted from a bona fide error," such as calculation errors. 15 U.S.C. § 1640(c). And a creditor can avoid TILA liability by correcting its error within 60 days of discovering it, 15 U.S.C. § 1640(b), or by showing good faith reliance on a Federal Reserve regulation or staff interpretation. *Id.* § 1640(f). In any event, there is certainly something perverse about creditors complaining that, under the decision below, they will suffer too much for their frequent statutory violations—particularly given that Congress has limited civil liability to "material" violations. 1980 U.S.C.C.A.N. 267; *see Brown v. Payday Check Advance*, 202 F.3d at 991 (Congress amended "TILA in 1980 to curtail damages awards for picky and inconsequential formal errors.").

In addition, even if the *State Farm* framework were applicable here, TILA's statutory damages would not run afoul of due process. As Judge Posner explained in *Mathias v. Accor*



*Economy Lodging, Inc.*, 347 F.3d 672, 676-78 (7th Cir. 2003), *State Farm* does not establish a mathematical formula for evaluating punitive (or in this case statutory) damages awards. Courts must also consider whether any available award would otherwise "be too slight to give the victim an incentive to sue," and whether it "would enable the defendant to commit the offensive act with [relative] impunity provided that he was willing to pay." *Id.* at 677. Both of those concerns support the constitutionality of the plain language that Congress enacted. As Judge Luttig held, that language is susceptible of only one reasonable interpretation: The limitation on damages available under "this subparagraph" applies only to actions described in subpart (ii), and not to those, like Mr. Nigh's, described in (i).

## CONCLUSION

The decision of the Fourth Circuit should be affirmed.

Respectfully submitted,

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